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**DEPT. OF ENVIRONMENT AND
NATURAL RESOURCES,
SECRETARY'S OFFICE**

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South Dakota Department of Environmental
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Re: Proposed Hyperion Refinery & Electric Generating Plant (the "Hyperion Energy Center") - Need for an Environmental Impact Statement, Pursuant to the South Dakota Environmental Policy Act

Dear Mr. Pirner:

On behalf of our clients Save Union County, Citizens Opposed to Oil Pollution, and the Sierra Club, we write to seek reconsideration of the determination – as set forth in your letter dated August 1, 2008 to the Honorable Scott Heidepriem, Minority Leader of the South Dakota State Senate – which denied the request that the South Dakota Department of Environment and Natural Resources (DENR) require an Environmental Impact Statement (EIS) for the proposed Hyperion Energy Center.

The Hyperion Energy Center, if it proceeds, will be, by far, the largest refinery and electric generating plant ever built in South Dakota and one of the largest in the United States. As planned, the Hyperion Energy Center will be massive, including a 400,000 barrel per day refinery and an approximately 200 MW integrated gasification combined cycle power plant. As your August 1 letter recognizes, it will emit, without question, serious pollutants. We understand that these pollutants will include approximately:

- 19 million tons per year of carbon dioxide;
- 1,999 tons per year of carbon monoxide;
- 773 tons per year of nitrogen oxides;
- 863 tons per year of sulfur dioxide; and
- 1,046 tons per year of harmful fine particulates.

Furthermore, the Hyperion Energy Center will not only pollute the air, but it will also adversely impact neighboring waters, due to the water needs and wastewater discharges of the refinery and generating plant. In addition, there will be other significant wastes arising from or generated during the Center's construction and operation, including those arising from (i) the plan to

transport tar sands crude by pipeline to the Center from Canada, (ii) potential emissions from flares, and (iii) waste disposal activities. We are further informed that the Center will emit numerous hazardous air pollutants as well, including highly toxic mercury. Without question, the Hyperion Energy Center has the potential to do more environmental damage than any other industrial project constructed in South Dakota during the past 100 years.

Our clients and their members will be directly, materially, and continuously affected by the proposed construction and operation of the Hyperion Energy Center. Our clients include South Dakota citizens, area landowners, and neighboring residents, whose quiet enjoyment of their properties and conduct of their daily activities will be adversely impacted and disrupted by the odors, emissions, and pollutants generated by the Hyperion Energy Center. Our clients will be adversely affected every day, and not just in minor ways; to the contrary, the impacts caused by the Hyperion Energy Center pose major, significant, and continuous risks to the public health, as well as to our clients individually and collectively.

Your letter of August 1 states that “we agree ... that to make the best and most informed decisions as the project proceeds, both DENR and the public need to know as much as possible about the proposed Hyperion Energy Center.” (*Letter, at p. 3.*) Nonetheless, you remarkably conclude that no EIS is necessary under state law, because “the environmental permitting process authorized by state law will provide the most complete, detailed, and best information for making those decisions.” (*Id.*)

We respectfully urge you to reconsider that conclusion. The very “purpose” of an EIS under South Dakota law “is to provide detailed information about the effect which a proposed action is likely to have upon the environment, to list ways in which any adverse effects of the action might be minimized, and to suggest alternatives to the action.” *S.D. Codified Laws § 34A-9-4 (2008)*. This purpose mirrors that under the analogous federal environmental law known as the National Environmental Policy Act (NEPA). In fact, the South Dakota legislature acknowledged that the South Dakota EIS requirements are modeled after NEPA by directly referencing NEPA requirements in the South Dakota EIS law. *S.D. Codified Laws § 34A-9-7*. NEPA was passed to ensure that decision-making agencies “will have available, and will carefully consider, detailed information concerning significant environmental impact [and] guarantee [] that the relevant information will be made available to the larger [public] audience.” *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)); see also 40 C.F.R. § 1500.1(b) (finding that environmental information must be provided “before decisions are made and before actions are taken” (emphasis added)). “NEPA expresses a Congressional determination that procrastination on environmental concerns is no longer acceptable.” *Found. for N. Am. Wild Sheep v. U.S. Dep’t of Agric.*, 681 F.2d 1172, 1181 (9th Cir. 1982).

The strong public policy goals for conducting an EIS are also evident in the South Dakota Environmental Protection Act of 1973 (SDEPA). *S.D. Codified Laws §§ 34A-10-1 et seq.* As part of any DENR permitting proceedings, such as Hyperion’s current PSD permit application, the SDEPA requires DENR to determine “any alleged pollution, impairment, or destruction of

the air, water, or other natural resources or the public trust.” *S.D. Codified Laws § 34A-10-8*. If a proposed project will have detrimental effects on the air, water, or other natural resources of South Dakota, and there is “a feasible and prudent alternative,” the SDEPA states that such a project shall not be authorized. *Id.* In order to comply with the SDEPA, DENR must determine the Hyperion Energy Center’s potential for harming the air, water, or other natural resources of South Dakota and determine whether there are any feasible and prudent alternatives to the project proposed by Hyperion. Conducting an EIS is the most logical method DENR can implement in order to make such a determination and thus comply with the SDEPA.

If there were ever a project in South Dakota requiring an environmental impact statement, this is it. Indeed, if DENR will not require an EIS in this case, then it is difficult to imagine a situation where DENR would ever require one. Nonetheless, in the August 1 letter, you conclude that the fact that Hyperion “will need to comply with” South Dakota’s permitting requirements should be sufficient. (*Letter at pp. 1-2*.) That assertion is, simply, incorrect. The purpose of an EIS, under either federal or state law, is to provide a full analysis and assessment of a proposed project at the outset, before there is an irreversible and irretrievable commitment of resources. *S.D. Codified Laws § 34A-9-4 (2008)*. In other words, an EIS must be undertaken before decisions are made concerning the issuance of licenses, so that there is not an irreversible or irretrievable commitment of resources to a project which renders the decision to proceed with a project inevitable or a *fait accompli*. Moreover, the EIS must “rigorously explore and objectively evaluate all reasonable alternatives,” 40 C.F.R. § 1502.14(a), because the analysis of alternatives is the “heart” of the EIS.¹ *Id.* See also *Ilio’ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1095 (9th Cir. 2006); *NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir. 2005). In other words, environmental impact analysis must consider the alternatives to a proposed project, “to the fullest extent possible.” 42 U.S.C. § 4332(2)(c)(i); see also 40 C.F.R. § 1500.2. This review of alternatives should include, but not be limited to: (i) rigorously exploring and objectively evaluating all reasonable alternatives to the project in detail, to allow for an evaluation of the comparative merits of alternatives; (ii) an assessment of reasonable alternatives including those not within the jurisdiction of the lead agency; and (iii) an evaluation of the alternative of no action at all, *i.e.*, not proceeding with the project at all. See 40 C.F.R. § 1502.14.

As you indicated in your letter, there will be at least thirteen “individual regulatory reviews” of the Hyperion Energy Center.² (*Letter, at pp. 1-2*) However, in this case, the “individual

¹ Even Hyperion acknowledged the importance of considering alternatives when, in its permit application, it stated that it is considering other sites in the Midwestern United States for locating the Hyperion Energy Center. (*Hyperion Application, at p. 2*)

² The individual regulatory reviews listed are:

1. Prevention of Significant Deterioration pre-construction air quality permit;
2. Title V air quality operating permit;
3. Water right permit;
4. Surface water discharge permit;
5. Strom water discharge permit;
6. Hazardous waste disposal requirements;

regulatory reviews” which you reference will not achieve the goals of an environmental impact analysis. To the contrary, South Dakota’s planned “individual regulatory reviews” will not:

- evaluate the environmental impacts of the Hyperion Energy Center to the fullest extent possible before an irretrievable and irreversible commitment of resources is made;
- provide a full upfront analysis of all environmental impacts from the Hyperion Energy Center upon the air, water, and soils -- both in South Dakota and also in downwind states;
- rigorously explore and objectively evaluate all reasonable alternatives to the Hyperion Energy Center; or
- evaluate the cumulative environmental impacts from the construction and operation of the Hyperion Energy Center.

Consequently, without an environmental impact analysis undertaken prior to the commencement of these individual regulatory reviews, the DENR will not be able “to make the best and most informed decisions” (*Letter, at p. 3*) and the public’s right to know will be irrevocably compromised, contrary to the very goals with which you agree (*Letter, at p. 3*). Because there are numerous “individual regulatory reviews” that will take place for the Hyperion Energy Center, interagency cooperation is necessary to fully understand the impacts of such a large project. Interagency cooperation is anticipated by the Clean Air Act regulations that are currently under consideration in Hyperion’s PSD permit application. These regulations state that when an EIS is being prepared for a proposed source, the review of the PSD permit application “shall be coordinated with the broad environmental reviews under [NEPA] to the maximum extent feasible and reasonable.” 40 C.F.R. § 52.21(s). The only way to gain a full understanding of the environmental impacts of the Hyperion Energy Center is if the numerous agencies that will be conducting “individual regulatory reviews” of the proposed project coordinate their efforts to conduct a comprehensive environmental review.

Finally, we note that the Hyperion Energy Center, in its Petition for the Issuance of a Prevention of Significant Deterioration Air Quality Preconstruction Permit, has failed even to address numerous key issues which, we submit, should be addressed by the DENR in an environmental assessment and impact analysis before the proposed permit can issue. The present DENR

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7. SARA Title III reporting;
 8. Underground and above ground storage tank requirements;
 9. Drinking water regulations/standards;
 10. Operator certification;
 11. Engineering plans and specifications review and approval;
 12. Ground water discharge permit; and
 13. Permit for disposal of wastes.

permitting process is not holistic and will omit many major and significant parameters from consideration. Among the items not considered or inadequately reviewed are the following:

- Noise;
- Odors;
- Night lightings effects on birds, insects, and humans;
- There will be no review of Best Management Practices to examine alternative placements of petroleum-bearing pipes within the refinery;
- Placement of pipes carrying crude to the refinery will be considered after the details of plant construction. There is currently no description of how crude will be conveyed to the site;
- There will be no opportunity to discuss water withdrawals (either on or off-site) and water use efficiency in the plant (i.e. water recycling in the plant);
- There will be no opportunity to review energy efficiency on an energy input per product output basis;
- There is no consideration of energy recovery alternatives from process heater waste heat now discharged, including overall site energy efficiency and utilization review;
- Site wide groundwater conservation and control measures;
- Local and regional road traffic issues;
- Regional increased demand for housing and services during project construction, including degradation of local rural roads used for construction;
- Review of potential for rail shipments to disrupt local railroad and highway crossings as well as local farming and business operations;
- Project site wetlands and stream water quality and aquatic habitat alternatives evaluation and ambient water quality impact;
- Project site terrestrial wildlife habitat evaluation;
- Project site stormwater management considerations both during and after construction;
- Evaluation of endangered species impacts from any of the project site's physical elements;

- Project impact mitigation alternatives, both onsite and off;
- Social impact of the refinery on rural area population and local patterns of development, including negative impact on the area's rural character;
- Evaluation and overall systems review of reliance on tar sands development in Canada to support crude availability for the Center;
- Evaluation of physical connectedness elements between the refinery ad input and output pipelines;
- Discussion and layout of proposed refined product pipelines, especially as they relate to public rights-of-way and water resources;
- Disposal of brines and salts contained in crude received by the plant, including consideration of the alternative of deep well disposal for brines and ammonia solutions;
- Discussion of any facility solid waste management units planned;
- Disposition of wastewater treatment sludge, including potential for coking as material recovery;
- Discussion of energy infrastructure protection and security considerations;
- Discussion of flare and relief system alternatives, including visual impacts of flares offsite;
- Effect of facility existence on need for local firefighting services and firefighter training;
- Effect of facility existence on need for public safety and homeland security resources;
- Facility construction and operation impacts on patterns of local and regional skilled labor utilization;
- Review of maximum offsite consequences of a toxic release and/or disposal from the facility;
- Multi-media and process media transfer review on toxicants;
- Review of persistent and bio-accumulative toxicant emissions, such as mercury, with full emission and process characterization and multi-pathway environmental and ecological risk assessment;

- Identification of any invasive or nuisance plant species present at the site, if any, and identify whether construction activities have the potential to cause invasive or nuisance plant species to be brought onsite;
- Review of all irretrievable commitments of natural resources inherent in project development including from source to distribution of refined products;
- Socio-economic impacts on the local and regional neighborhoods relative to social service needs during construction as well as normal operations; or
- Regional impacts on neighboring states that must be evaluated by other states or other parties.

For all of the foregoing reasons, we respectfully request reconsideration of the decision not to require an EIS for the proposed Hyperion Energy Center. The time for an EIS is now. Individual regulatory reviews are no substitute for the full and fair analysis by DENR of the environmental impacts of the Hyperion Energy Center. The EIS analysis which we now seek is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). South Dakota citizens, and our clients, we submit, are entitled to no less.

We thank you in advance for your time and effort in considering this request.

Sincerely,

Save Union County, Citizens Opposed to Oil
Pollution, and the Sierra Club

By: Robert L. Graham
One of Their Attorneys